Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1995

LARRY BROWN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED

A. Whether a defendant convicted of conspiracy to possess an incendiary device is never entitled to a reduction in sentence under U.S.S.G. 2X1.1(b)(2) where some of the materials used to create the incendiary device are easily obtainable.

B. Whether a defendant convicted of conspiracy to possess an incendiary device can be denied a reduction in sentence under U.S.S.G. 2X1.1(b)(2) where he hired someone who could complete the conspiracy, irregardless of the extent to which the conspiracy progressed.

II. LIST OF PARTIES

A. Larry Brown
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B. United States of America
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PETITION FOR WRIT OF CERTIORARI

Petitioner, Larry Brown, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed January 30, 1996, entered February 16, 1996 (petition for rehearing denied March 13, 1996) affirming his sentence.

V. OPINIONS BELOW

The opinion of the Court of Appeals is reported, *United States v. Brown*, 74 F.3d 891 (8th Cir. 1996).

The judgment of the United States District Court for the Eastern District of Missouri has not been reported. A copy of the judgment is set forth in the appendix.

VI. JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on February 16, 1996. Timely motion for rehearing was filed and was denied on March 13, 1996. This Court has jurisdiction under 28 U.S.C. section 1254(1).

VII. FEDERAL RULES AND STATUTORY PROVISIONS INVOLVED

United States Sentencing Commission Guidelines 2X1.1(b)(2)

VIII. STATEMENT OF THE CASE

Petitioner Larry Brown pleaded guilty on July 8, 1994 to a charge of conspiracy to possess an incendiary device.

A fifty seven month sentence was imposed. Petitioner appealed his sentence to the Eighth Circuit Court of Appeals, which upheld Petitioner's sentence.

Petitioner conspired with others in order to take revenge on one Keith Milton. They conspired to place a wired spark plug in the gas tank of Milton's car, which would cause the car to explode when it was started (the wire would be connected to the ignition). (ST 37) The petitioner hired someone who could wire the car. There was no evidence presented that the conspirators possessed either the spark plug or wire. The evidence was uncontroverted that the conspirators, including the petitioner, could not find Milton's residence. (ST 35)

IX. REASONS FOR GRANTING THE WRIT

A. Misapplication of the Guidelines.

The United States Sentencing Commission, *Guidelines Manual*, Section 2X1.1(b)(2) (1993) (hereinafter "U.S.S.G. Section 2X1.1(b)(2)") instructs that for a defendant convicted of conspiracy a sentencing court must decrease the offense level by three

> unless the defendant or co-conspirator completed all of the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.

The Eighth Circuit affirmed the sentencing court's denial of the three point reduction on two grounds, the

first being that spark plug and wire are easily obtainable. *United States v. Brown*, 74 F.3d 891, 893 (8th Cir. 1996). The court said,

> *The government responds that a reduction was not warranted because a spark plug and wire were easily obtainable* and, as the District Court found, by hiring Vaughn who "could do the job," Brown did all he believed was necessary for completion of the offense. We agree.

Id. (emphasis added). The conspirators had conspired to use a spark plug and wire to detonate Keith Milton's car by placing a spark plug in his gasoline tank, connected to a wire, which was connected to the car's ignition.

The proposition that because the elements of the incendiary device are easily obtainable the petitioner was not entitled to a three point reduction runs contrary to the intent of the Guidelines. The very language of 2X1.1(b)(2) contemplates that if certain conspiracies are not completed, the conspirators are entitled to a three point reduction if it had not progressed beyond a certain point. Following the reasoning of the Eighth Circuit, a conspiracy to possess an incendiary device such as the one petitioner pleaded guilty to would never be entitled to the benefit of U.S.S.G. 2X1.1(b)(2), since the materials to possess the incendiary device are easily obtainable.

The Eighth Circuit attempts to support its rationale by pointing to decisions where "courts have upheld the denial of a reduction even though a defendant had not reached the 'last step' before completion of the substantive offense." *Brown*, 74 F.3d at 893. However, by arguing generally that a conspiracy need not be at its "last step" when the materials used to actualize the substantive

offense are easily obtainable, the Eighth Circuit turns the "last step" analysis into a "no step is needed" analysis. In the instant case, the conspirators had not even located the victim's residence or car, which would provide them the most important element of the incendiary device, i.e., the car's gasoline. (ST 35) *See, United States v. Malonie*, 546 F.2d 1182 (5th Cir. 1977) (stating that the substantive offense of illegal possession of an incendiary device is not realized unless the explosive material of the incendiary device is possessed).

B. Misapplication of the Guidelines.

The Eighth Circuit's second ground for affirming the sentencing court's denial of the three point reduction under U.S.S.G. 2X1.1(b)(2) is based on the sentencing court's finding that the petitioner "did all *he* believed was necessary for completion of the offense" when he hired a coconspirator who could perpetrate the substantive offense. *Brown*, 74 F.3d at 893. (emphasis added). This analysis incorrectly focuses on the role of the individual conspirator in the conspiracy rather than the acts necessitated by the conspiracy for a completion of the substantive offense. Again, U.S.S.G. 2X1.1(b)(2) requires a three point reduction

> unless the defendant or co-conspirator completed *all of the acts the conspirators* believed necessary on *their* part for the successful completion of the substantive offense or the circumstances demonstrate that the *conspirators* were about to complete *all such acts* but for apprehension or interruption by some similar event beyond the defendant's control.

It is clear from the plain language of the statute that it mandates an analysis of how far the conspiracy as a whole progressed and not the extent to which an individual had completed his role in the conspiracy. The statute clearly mandates an analysis of "all of the acts [of] the *conspirators*". Where the statute speaks of the acts which "were about to complete" it refers to those acts the "conspirators" (plural) were about to complete. There is simply no authority cited by the court for its analysis centered solely on the role of the petitioner, and it runs contrary to the plain language of the statute.

X. CONCLUSION

The error committed in the courts below and reported in the Eighth Circuit's published opinion is quite clear. The Guidelines obviously intend for a reduction in sentence for defendants in conspiracies which have not progressed. The Eighth Circuit's reasoning subverts the plain language of the Guidelines and should be reviewed lest it further injustice.

WHEREFORE, for the foregoing reasons, Petitioner, Larry Brown, respectfully prays that this Court grant a Writ of Certiorari to review the decision of the Eighth Circuit Court of Appeals and the judgment and sentencing issued.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No 94-3665

United States of America, Appellee, v. Larry Brown, Appellant.	* * * * * * * * *	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 12, 1995

Filed: January 30, 1996

Before FAGG, Circuit Judge, and FLOYD R. GIBSON and HENLEY, Senior Circuit Judges.

HENLEY, Senior Circuit Judge.

Larry Brown appeals from a 57-month sentence imposed by the district court[1] following his guilty plea to possession of an incendiary device, in violation of 18 U.S.C. § 371. We affirm.

---

[1] The Honorable Carol E. Jackson, United States District Judge for the Eastern District of Missouri.

During a meeting between Brown, a union business agent, and Keith Milton, a union member, regarding Milton's dissatisfaction with the union's handling of a grievance, the two came to blows. The union suspended Brown after Milton filed a complaint against him. A few days later, on August 13, 1993, Brown sought the assistance of Martin Dames, an acquaintance who was also an FBI undercover informant, in injuring Milton and his property. On August 17, Brown introduced Dames to Donald Vaughn, who was on parole for murder.

On August 26, the trio met and Vaughn suggested putting a wired spark plug in the gas tank of Milton's car, which would cause the car to explode when it was started, a feat Vaughn said he had successfully performed in the past. During the course of several meetings, Brown and Vaughn discussed various ways of harming Milton and his property. They also made several attempts to locate Milton and his house. In September, Department of Labor agents questioned Brown as to whether he was stalking Milton and told him he would be a suspect if Milton were hurt. Brown told Dames about this conversation and said he had to be careful. In May 1994, Brown was charged with conspiracy to possess an incendiary device.

The presentence report (PSR) calculated a total offense level of 23, a criminal history category of I, and a Guidelines range of 46 to 57 months. Brown filed objections to the PSR, contending, inter alia, that he was entitled to a three-level reduction under U.S.S.G. § 2X1.1(b)(2) because he had not completed the acts necessary for the successful completion of the substantive offense. In relevant part, Section 2X1.1(b)(2) provides for

a three-level reduction in conspiracy cases, "unless the defendant or a coconspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense."

At sentencing, Brown again claimed he was entitled to the reduction, attempting to characterize the substantive offense as arson or murder. Terry Coff, an FBI agent who investigated the case, testified that the conspirators had met seven times and during these meetings the plans regarding harming Milton "changed a few times," but at the last meeting Brown insisted that "we're still going to burn his house and blow up his car."

The court overruled Brown's objection. The court stated that the focus of the guideline was on the substantive offense and what a defendant thought was necessary on his part for successful completion of the offense. The court indicated that had the substantive offense been arson or murder, as Brown had suggested, a reduction might have been warranted. However, the court found that the substantive offense was possession of an incendiary device and that by hiring somebody "who could do the job" Brown did "what he thought was necessary to successfully complete the act."

On appeal, Brown first suggests that the district court erred as a matter of law in applying 2X1.1(b)(2) by failing to distinguish between the conspiracy and the substantive offense. *See United States v. Rothman*, 914 F.2d 708, 710-11 (5th Cir. 1990) ("offense" in § 2X1.1(b)(2) refers to "underlying offense and not the conspiracy"). However, he reluctantly admits that the court did distinguish between the conspiracy and the substantive offense. In

fact, as the government points out, the district court was careful to note that the substantive offense was possession of an incendiary device, and not arson or murder, as Brown had suggested. *See United States v. Westerman*, 973 F.2d 1422, 1428 (8th Cir. 1992) (court erred in applying 2X1.1(b)(2) by treating arson rather than mail fraud as substantive offense).

In the alternative, Brown argues that, as a matter of fact, the denial of the reduction was clearly erroneous because the conspirators did not possess the incendiary device. The government responds that a reduction was not warranted because a spark plug and wire were easily obtainable and, as the district court found by hiring Vaughn who "could do the job," Brown did all he believed was necessary for completion of the offense. We agree. As the government notes, whether a reduction under Section 2X1.1 is warranted is a fact-specific inquiry, and courts have upheld the denial of a reduction even though a defendant had not reached the "last step" before completion of the substantive offense. For example, in an analogous situation, in *United States v. Barton*, 32 F.3d 61, 64 (4th Cir. 1994), a defendant pleaded guilty to attempted money laundering. section 2X1.1(b)(1) provides a three-level reduction for an attempt, "unless the defendant completes all the acts [he] believed necessary for successful completion of the substantive offense." The court rejected the defendant's argument that a reduction was warranted because his money laundering "schemes were patently ridiculous . . . not one of [them] could ever have led to the successful completion of a money laundering transaction." *Id.* "Despite [the defendant's] protestations of naivete and ineptitude," the court upheld

the denial of the reduction because defendant had accepted a suitcase containing money, which was "the first step or initiation of his planned delivery of what he believed was drug money to his associate[,]" who had given assurances that she could launder money. *Id.*

Brown also argues that the district court erred in restricting his cross-examination of Coff and thereby prevented him from proving that he had abandoned the spark plug conspiracy and had moved on to other conspiracies. We find no error. In fact, the court allowed cross-examination about the various plans to harm Milton, but noted the discussion of other plans was irrelevant to the conspiracy to which Brown had pleaded guilty – possession of an incendiary device. Moreover, we note that after Brown's cross-examination, on redirect, Coff stated that even though other plans had been discussed at the last meeting Brown still insisted on "burn[ing] [Milton's] house and blow[ing] up his car."

Accordingly, the judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA

V.

LARRY BROWN
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After 11/1/87)

(Filed Oct. 6, 1994)

Case Number:
4:94CR117 (CEJ)

William Gavras & Joel Schwartz
Defendant's Attorney

THE DEFENDANT:

[X] *Pleaded guilty to count(s)* 1 .

[ ] *Was found guilty on count(s)* _____ *after a plea of not guilty.*

Accordingly the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Conspiracy to Possess an Incendiary Device	08/04/93	1

The defendant is sentenced as provided in pages 2 through 4 *of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.*

[ ] *The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).*

[ ] *Count(s) _____ (is) (are) dismissed on the motion of the United States.*

[X] *It is ordered that the defendant shall pay to the United States a special assessment of* $ 50.00 *, for count(s)* 1 *, which shall be due* [X] *immediately* [ ] *as follows:*

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendants Soc. Sec. No.:
490-48-3293

Defendant's Date of Birth:
12-13-44

Defendant's mailing address:

2802 Corral Drive
Arnold Missour [sic]
63010

Defendant's residence address:

Same as above

October 21, 1994
Date of Imposition of Sentence

/s/ Carol E. Jackson
Signature of Judicial Officer

Carol E. Jackson
U.S. District Judge
Name and Title of Judicial Officer

October 21, 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of:

fifty-seven (57) months

[X] *The Court makes the following recommendations to the Bureau of Prisons:*

that defendant be placed in a medical facility closest to St. Louis, Missouri

[ ] *The defendant is remanded to the custody of the United States Marshal.*

[ ] *The defendant shall surrender to the United States Marshal for this district,*

a.m.
[ ] *at ___ p.m. on ___.*

[ ] *as notified by the Marshal.*

[X] *The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,*

[ ] *before 2:00 p.m. on ___.*

[X] *as notified by the United States Marshal.*
[ ] *as notified by the Probation Office.*

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

two (2) years

While on supervised release, the defendants shall not commit another Federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this Judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] *The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.*

[ ] *The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.*

[ ] *The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.*

The defendant shall participate in a mental health program as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment, the defendant shall not commit another Federal, state or local crime. In addition:

1) *the defendant shall not leave the judicial district without permission of the court or probation officer;*

2) *the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;*

3) *the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;*

4) *the defendant shall support his or her dependents and meet other family responsibilities;*

5) *the defendant shall work regularly as a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;*

6) *the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;*

7) *the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;*

8) *the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;*

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third party risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall not possess a firearm or destructive device.

STATEMENT OF REASONS

[X] *The Court adopts the factual findings in the presentence report as to the applicable guideline factors,*

OR

[ ] *The Court adopts the factual findings in the presentence report as to the applicable guideline factors except:*
(See attachments if necessary)

Guideline Range as Determined by the Court:

Total Offense Level: _____
Criminal History Category: _____
Imprisonment Range: ___ *to* ___ *months*
Supervised Release Range: ___ *to* ___ *years*
Fine Range: $ ___ *to* $ ___
(plus $ 1,492.00 cost of imprisonment and $115.30 cost of supervision per month) _____
$_____ *Restitution* $_____ *Special Assessment*

[X] *Fine waived or imposed below guideline range because of inability to pay.*

[X] *Sentence Imposed is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.*

[ ] *Because the width of the guideline range exceeds 24 months, the reason for selecting this particular point within the range is:*

[ ] *The Court departs from the Guideline (See attachments if necessary)*

[ ] *upon motion of the government, as a result of defendant's substantial assistance.*

[ ] *for the following reason(s):*

[ ] *Court orders transcript of Statement of Reasons to be attached.*